

RAMONA FIELD

IBLA 88-107

Decided September 14, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rescinding its prior approval of Native allotment application F-17271 in part.

Set aside and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Patents of Public Lands: Effect--Public Lands: Jurisdiction Over

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Patents of Public Lands: Effect--Public Lands: Jurisdiction Over

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Withdrawals and Reservations: Generally

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn

by Exec. Order No. 2089 embrace the lands identified in an application.

APPEARANCES: Mark Regan, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ramona Field (Field) has appealed from an October 26, 1987, decision of the Alaska State Office, Bureau of Land Management (BLM), rescinding approval of Native allotment application F-17271 in part.

On March 31, 1972, the Bureau of Indian Affairs (BIA) filed Native allotment application F-17271 and evidence of use and occupancy on behalf of Field, pursuant to the provisions of the Native Allotment Act of 1906, 43 U.S.C. § 270-1 (1970). ^{1/} The application, which was before the Department on December 18, 1971, claimed use and occupancy of approximately 160 acres of unsurveyed land commencing in June 1945.

On October 25, 1977, BLM sent a notice to Field that it had approved her Native allotment application. This approval decision stated that her application had been approved for 160 acres, and noted that "the land must now be surveyed so that it can be legally described." On April 3, 1980, the Chief, Branch of Cadastral Field Surveys, directed that the Land Surveyor execute a survey of the lands described in the allotment application. U.S. Survey No. 6253 was performed, but no Native Allotment was issued to Field.

In its October 26, 1987, decision, BLM advised Field:

When reviewing the casefile for approval, inadvertently over-looked was Executive Order No. 2089, dated November 21, 1914, which reserved the land, subject to any existing vested rights, for the use of the United States Bureau of Education and of the natives of the indigenous Alaskan race who may there reside * * *.

(Decision at 1).

Relying upon this Board's decision in Heirs of Doreen Itta, 97 IBLA 261 (1987), BLM stated that "a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates the use and occupancy began after the land had been withdrawn" (Decision at 1). Field was born in 1935 and claimed use and occupancy commencing in June 1945. There being no way that her use and occupancy of the tract could have predated the November 21, 1914, withdrawal, BLM rescinded the allotment application approval letter of October 25, 1977, in part, and

^{1/} The Native Allotment Act of 1906 was subsequently repealed with a savings provision by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1982).

rejected her application for approximately 140 acres of land deemed to be within the tract withdrawn by Exec. Order No. 2089.

In her statement of reasons (SOR) on appeal, Field advances two reasons for error in the October 1987 decision. She first asserts that BLM lacks authority to vacate the 10-year-old decision approving her allotment application, because that decision created property rights which cannot be administratively revoked. Secondly, she argues that the decision to reject her application was based upon the unsupported assumption that the rejected land had been withdrawn.

Field contends that contemporary interpretations of the Act would indicate that an "allotment" takes place when the Secretary approves the Native's allotment application. She argues that the certificate of allotment is a record of a prior conveyance. She also contends that the Act made no provisions for "patents" to be issued to allottees, and thus the notice of approval served as "a record of the approval [which] 'would be kept on file in this office.'" *Alaskan Lands-Allotments to Indians and Eskimos-Act of May 17, 1906*, 35 Pub. Lands Dec. 437 (1907)" (SOR at 6).

Field states that when BLM approves an allotment application, the allottee acquires equitable title to the land described in the approval document. Citing *State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985), *aff'd sub nom. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987), she contends the applicant's rights to the land involved may become vested even before the application is approved, further arguing that an allottee whose application has been approved has acquired a recognized property right.

In furtherance of this contention she argues that the Department's policy regarding an approved Native allotment application is inconsistent with the concept that it may subsequently rescind its approval decision. According to appellant, an allottee holding an approved application may enter into contracts to sell the allotments, lease the allotments and receive the proceeds, cut and sell timber, and extract and sell sand and gravel. She also notes that if an allottee dies, his or her interest in the allotment is disposed of in a probate conducted by BIA, even though no Native Allotment has been issued.

Appellant finally argues that BLM's decision to reject 140 acres of the lands in her application because of the 1914 Executive Order withdrawal is based on an unresolved issue of fact. She notes that the boundaries of the Kobuk Native Reservation, created by Exec. Order No. 2089, have never been surveyed. She further asserts that two maps place the reservation boundaries at different locations, with one of the maps showing the majority of the land described in her application as being outside the reservation. She then asserts that because of this issue of fact, she is entitled to a hearing pursuant to *Pence v. Kleppe*, 529 F.2d 135, 142-43 (9th Cir. 1976).

[1] Initially, we will address the nature of the "title" vested in Field by the Department's approval decision. There can be no question that whatever rights she has obtained were obtained under and by reason of the Native Allotment Act. ^{2/} The provisions of that Act applicable to this decision state: "The Secretary * * * is authorized and empowered * * * to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska * * * to any Indian, Aleut, or Eskimo * * * who resides in and is a native of Alaska * * *." (Emphasis added.) 43 U.S.C. § 270-1 (1970), see also note 1. We note that no language in the Native Allotment Act, the General Land Office Circulars, Alaskan Lands--Allotments to Indians or Eskimos--Act of May 17, 1906 (Cir. Feb. 11, 1907), 35 L.D. 437 (1907), and Allotments to Indians or Eskimos in Alaska--Act of May 17, 1906 (Cir. Apr. 29, 1909), 37 L.D. 615 (1909), relied on by appellant address legal or equitable title considerations. However, it is clear that a valid existing right ^{3/} which had attached to the land and continued in existence during the entire period of the applicant's use and occupancy vitiates approval of an allotment application.

The original Act did not provide for the issuance of a Native Allotment in the manner suggested by Field. Alaskan Lands--Allotments to Indians or Eskimos--Act of May 17, 1906 (Cir. Feb. 11, 1907), 35 L.D. 437 (1907), specified the procedure for applying for granting an allotment and stated: "The allotments when found correct in form, and without valid adverse claims will be placed on a schedule which will be submitted to the Department for approval, and thereafter, as no provision is made for issuing patents, the same will be kept on file in this office." (Emphasis added.)

Allotments to Indians or Eskimos in Alaska--Act of May 17, 1906 (Cir. Apr. 29, 1909), 37 L.D. 615 (1909), provided for the issuance of a certificate of allotment, but employed the identical "without valid adverse claims" language, stating:

8. You will assist the applicants in any feasible manner, and as the act makes no provision for any fees for filing you will make no charge in any of these cases. The allotments, when found correct in form, and without valid adverse claims, will be placed on a schedule which will be submitted to the Department for approval, and thereafter, as no provision is made for issuing

^{2/} The additional consideration of how section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, 43 U.S.C. § 1634(a) 1982), may have affected those rights is discussed later in this decision.

^{3/} As used in this decision, the terms "valid existing right" and "valid adverse claim" mean a right, appropriation, or designation which causes the land to be no longer vacant, unappropriated, or unreserved. Such right or claim may be a valid entry by a third party (e.g., a homestead entry), a formal withdrawal of the land (e.g., a withdrawal for a National Park), or a reservation of the land for another use (e.g., a military or Indian reservation).

patents, the same will be kept on file in this office, and a certificate of the approval of the allotment will be issued by this office and transmitted to you for immediate delivery to the allottee. [Emphasis added.]

In either case, a valid adverse claim vitiates both the approval of the Native allotment application and a Native Allotment. Hence, to the extent of any prior valid existing right to the land described in the Native allotment application, an allottee gains no rights, and thus can gain neither equitable nor legal title.

Neither the Native Allotment Act nor the regulation, 43 CFR 2561.3 (1987), describes the instrument of conveyance by which the title to the Native allotment passes to the allottee. However, in State of Alaska, 45 IBLA 318 (1980), we stated:

Turning for historical reference to a Departmental publication, Circulars and Regulations of the General Land Office, Jan. 1930 ed., we find the following concerning Alaska Native allotments, at page 225:

RECORD OF APPROVED ALLOTMENTS--CERTIFICATE TO ALLOTTEE

22. A schedule of all approved allotments shall be kept of record in the General Land Office; and, as the act makes no provisions for a patent, a certificate will issue showing the approval of the allotment (and the survey thereof, if surveyed) for delivery to the allottee.

This indicates that the certificate of allotment was the motive instrument by which the allotted land became "the prop-erty of the allottee and his heirs in perpetuity," at least in 1930. However, reference to BLM Manual instructions, V BLM 2A.5 (Rel. 154, 12/29/58), reveals an entirely different procedure involving two separate instruments entitled, respectively, the "Allotment Certificate" and the "Native Allotment." These documents are incorporated in the Manual as Illustrations 4 and 5. According to these instructions, when the Classification Officer reported that the allotment application was acceptable, the Adjudication Officer would issue an "Allotment Certificate," utilizing the familiar "Final Certificate" form with appropriate modifications effected by typewritten insertions and strike-outs. Then, according to the instructions, there was further processing of the application by the Classification Officer and the Engineering Officer. Upon completion of their work, the Patent Issuing Officer issued the instrument entitled "Native Allotment." This was the instrument which, according to its text, declared that "the land above described shall be deemed the homestead of the allottee and his heirs in perpetuity."

Inquiry of BLM's Alaska State Office discloses that the present practice does not include issuance of the interim "Allotment Certificate." Instead, when the Native's application is finally approved, he or she is given the instrument entitled "Native Allotment." The confusion arises out of the fact that BLM personnel commonly refer to this document as the "Certificate of Allotment," which would suggest--erroneously--that it was the "Allotment Certificate" or Final Certificate that the Native receives. The difference is significant, as the issuance of an "Allotment Certificate" or "Final Certificate" does not operate to pass the title, whereas the "Native Allotment" does so.

Id. at 320-21.

Hence, this Board held in State of Alaska, supra at page 322:

[T]he effect of issuing a Native [A]llotment, like the issuance of patent, is to transfer the legal title from the United States and to remove from the jurisdiction of this Department the resolution of disputes concerning rights to the land, even if the conveyance by the Department was wrongfully accomplished through inadvertence or mistake while disputed matters of fact concerning the priority of claimants to the land were then pending unsettled before the Department.

Irrespective of the fact that legal title vests by reason of issuance of a Native Allotment, action may be taken to amend the Native Allotment to exclude the land subject to the valid existing right. The significance of the issuance of a Native Allotment is that BLM no longer has jurisdiction over the land and is therefore not in a position to independently determine, in the administrative context, whether a valid existing right exists. Issuance of a Native Allotment is not conclusive proof that no valid existing right exists. Rather, when legal title passes, the Government no longer holds legal title to the property, no longer has administrative jurisdiction, and must proceed against the allottee in Federal court.

[2] The issue now before us is whether prior to issuance of a Native Allotment, BLM could modify its decision approving Field's Native allotment application to exclude those lands withdrawn prior to her occupancy, when the conflict between the prior withdrawal and her allotment application was discovered after issuing a decision approving the allotment application, but before issuance of the Native Allotment.

The vesting of equitable title does not preclude administrative action to rescind that title if a valid existing right would preclude issuance of the Native Allotment. The legal title remains in the United States and the equitable title is susceptible of being administratively modified or revoked by the Department in the presence of a valid existing right discovered prior

to issuance of the Native Allotment. It stands to reason, therefore, that if the Department finds its decision approving the allotment to be in error, that decision can also be rescinded or modified by administrative action, regardless of the rights which might be said to have accrued under an equitable title. See 43 CFR 1810.3.

An examination of section 905(e) of ANILCA makes it equally clear that Field's allotment application was not automatically approved by Congress when that Act was enacted. That statute states, in pertinent part:

Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the [Native Allotment Act] which were pending before the Department * * * on or before December 18, 1971, and which describe either land which was unreserved on December 18, 1968, or * * * are hereby approved on the one hundred and eightieth day following December 2, 1980 * * *. [Emphasis added.]

43 U.S.C. § 1634(a) (1982). The land subject to Exec. Order No. 2089 was reserved by that order and thus automatic approval was precluded by section 905 of ANILCA. These circumstances were not present when the Board considered the application of section 905 to the Native allotment application challenged in State of Alaska, 110 IBLA 224 (1989). That case addressed the question of legislative approval of a Native allotment application for lands open to entry, and found that Congress had precluded an examination of the issue of use and occupancy. In this case, the issue of use and occupancy is never reached.

Contrary to Field's equitable rights argument, the Department may amend an erroneous decision approving a Native allotment application at any time prior to the time the United States is divested of legal title to the land described in the application. Leo Titus, Sr., 89 IBLA 323, 327-28, 92 I.D. 578, 581 (1985). Divestiture occurs when the Department issues the final conveyancing instrument known as a "Native Allotment." Approval of an allotment application is an interim step in conveying the legal title to the allotment to the applicant, and the Department retains jurisdiction over the land in an application even after such approval. State of Alaska, 45 IBLA 318, 320-22 (1980). Accordingly, if the Department finds the approval decision to be in error, it may amend that decision at any time before the Native Allotment issues. Leo Titus, Sr., 89 IBLA at 327-28, 92 I.D. at 581. See also Eugene M. Witt, 90 IBLA 265 (1986).

In this case, a Native Allotment could not be issued at the time of the BLM decision approving Field's Native allotment application because the land had not been surveyed. Clearly the Department must retain jurisdiction to exclude lands described in the allotment application in whole or in part if, during the course of the survey, the Department discovers a valid existing right had previously attached to all or a portion of the same land and therefore the applicant's use and occupancy could not have satisfied the

requirements in 43 CFR 2561.0 through 2561.3 because the land, or a portion thereof, was not vacant, unappropriated, and unreserved nonmineral land during the period of use and occupancy. 4/

Appellant further attempts to bolster her argument by reference to State of Alaska v. 13.90 Acres of Land, supra at 1319. In that case the Government argued that BLM approval of an allotment application transforms public land into "trust or restricted Indian land" for purposes of the Quiet Title Act, 28 U.S.C. § 2409a (1982), and various pipeline related statutes. Although we find this case is inapposite, it is not inconsistent with the notion that legal title does not pass to the allottee until the Native Allotment is issued. Had the Native Allotment issued in Etalook, BIA, as trustee, would have been in no position to require Departmental approval of the rights-of-way, as legal title to the allotted lands would have vested in the allottee. 5/

Because the Native Allotment has not issued, BLM can administratively investigate and review the Native allotment application, and can reverse or modify its decision approving the Native allotment application if it determines a valid adverse claim exists.

[3] The ultimately decisive issue in this case is not whether BLM has the authority to rescind its decision approving appellant's Native allotment application upon finding that a valid existing right to the same land was in existence during the entire period of her use and occupancy but whether BLM has made a sufficient showing of this valid existing right to justify reversal of its October 25, 1977, decision.

4/ It is clear that the description contained in the approval notice was insufficient to accurately describe the lands to be conveyed. Therefore, it was imperative that the Department retain jurisdiction over the lands in order to conduct the survey. Likewise, if legal title were to have passed, and the description of what was actually found on the ground conflicted with the description in the approval decision, the Department would be required to seek an amendment of the "patent" through the Federal courts. The logic for retaining legal title until issuance of the Native Allotment is obvious.

5/ For this same reason, we find this case to be clearly distinguishable from the U.S. District Court for the District of Alaska's recent decision in Degnan v. Hodel, Civ. No. A87-252 (Order issued May 6, 1989). In that case BLM imposed a right-of-way pursuant to statutory authority granted some years after the issuance of the approval letter. The court noted that the application was approved, subject to survey, and held that the patent could not be encumbered by requirements imposed subsequent to approval, because the applicant met the use and occupancy requirements of the Native Allotment Act. In this case, for the withdrawn lands described in the allotment application, the applicant's use and occupancy did not meet the requirements of the Act because the land was reserved during the period of her use and occupancy.

The law is well settled that Alaska Native allotments can be granted only for vacant, unappropriated, and unreserved nonmineral land. An application for allotment for land withdrawn from entry when the applicant commences use and occupancy is nugatory and cannot be given life. Agnes Mayo Moore, 91 IBLA 343, 345 (1986); see Paul D. Tony, 43 IBLA 245 (1979). No rights may be initiated under the Alaska Native Allotment Act by occupation and use of lands not open to appropriation. See David Capjohn, 14 IBLA 330 (1974). Hence, if the withdrawal embraces the lands described in appellant's application, and predates the date appellant commenced use and occupancy of the lands, the withdrawal constitutes a valid adverse claim and BLM's October 26, 1977, decision reversing its prior approval of the allotment is justified.

However, we are compelled to agree with appellant that BLM has failed to make out a prima facie case that the lands withdrawn by Exec. Order No. 2089 ^{6/} creating the Kobuk River Reservation embrace the lands identified in appellant's application for Native allotment and later depicted in Survey No. 6253. The affidavit of Grenelda M. Edmiston (Appellant's Exh. 24) stating that the lands embraced by the 1914 withdrawal creating the reservation were never surveyed is not controverted by BLM. Nor does BLM controvert affiant's statements relative to the lack of a survey or information pinpointing the monuments used in the Executive Order's metes and bounds description. The geographical coordinates identified in Exec. Order No. 2089 are noted as "approximate" and BLM does not dispute affiant's statement that an attempt to draw the boundaries of the reservation based on those coordinates would not produce boundaries corresponding with either the master title plat or the map. Nor does BLM contend that it has identified that the "stump of a tree about 5 feet high, inscribed with a cross, on a high bank or wooded ridge at a place known as 'Putoo' or 'Hole'" (the starting point for the legal description of the withdrawn land) exists on the ground today. Accordingly, we find it impossible to determine where the lands withdrawn in Exec. Order No. 2089 are on the ground or, more critically, whether or to what extent they embrace the lands surveyed and identified in appellant's application for allotment. Absent a cadastral survey delineating the boundaries of the area withdrawn by Exec. Order No. 2089, the record is insufficient to justify any conclusion regarding the extent to which appellant's allotment is embraced by the subject withdrawal so as to constitute a valid adverse claim to the allotted lands.

^{6/} Exec. Order No. 2089 reserved a tract of land near the Kobuk River and was described as follows:

"Commencing at a stump of a tree about five feet high, inscribed with a cross, on a high bank or wooded ridge at a place known as 'Putoo' or 'Hole' on the south bank of the Kobuk River, about three miles above the source of the Riley Channel and just below the little island in the river known as 'The Island', thence running due north ten miles to a point for a place of beginning; thence due east seven and one-half miles to the northeast corner; thence due south fifteen miles to the southeast corner; thence due west fifteen miles to the southwest corner; thence due north fifteen miles to the northwest corner; thence due east seven and one-half miles to the place of beginning, located approximately in longitude 161°W, latitude 66°50'N."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge